



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2011

Ms. Robin J. Chapman
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2011-04059

Dear Ms. Chapman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412159 (DSHS File: 18469-2011).

The Texas Department of State Health Services (the "department") received a request for any inspections of a specified facility during the last five years, a copy of the facility license and narcotic treatment sheet or inventory, and seventeen categories of information relating to the investigation of the death of a named individual. You state you will release some information to the requestor, with information "withheld or redacted pursuant to a previous determination, including Open Records Decision No. 684."¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we address your assertion that the department is prohibited under section 2.13 of title 42 of the Code of Federal Regulations from acknowledging that records responsive to

¹Open Records Decision No. 684 (2009) is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the request for information relating to the named individual exist because doing so would reveal that the individual was a patient of a substance abuse treatment program. We note, however, that section 2.13(c) of title 42 of the Code of Federal Regulations provides that a patient's presence in such a facility may be acknowledged if the patient's written consent is obtained under subpart C of title 42. 42 C.F.R. § 2.13(c). In this instance, the individual at issue is deceased. Section 2.15 of title 42 of the Code of Federal Regulations provides that, in the instance of a deceased patient, if written consent is required for disclosure of information, the written consent may be given by:

an executor, administrator, or other personal representative appointed under applicable State law. If there is no such appointment the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

Id. § 2.15(b)(2). In this instance, the requestor has provided written consent for release of information and records relating to the deceased individual's medical records signed by the individual's father. Upon review, we conclude this written consent meets the requirements of section 2.15(b)(2) and subpart C of title 42. *See* 42 C.F.R. § 2.31(a) (listing required elements of written consent to disclosure under title 42). Thus, we conclude the department is not prohibited from acknowledging to this requestor that records responsive to the request for information relating to the named individual exist. Accordingly, we will address the applicability of the claimed exceptions to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides, in relevant part, as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

....

(d) The executive commissioner shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101 (a), (b), (d). You contend that the information you have marked was used by the department in an investigation of neglect of a disabled person under chapter 48. *See* §§ 48.002(a)(4) (defining "neglect" for the purposes of chapter 48), .002(a)(8) (defining "disabled person" for the purposes of chapter 48). Upon review, we agree that the information you have marked, which consists of a completed investigation report and related supporting files, reports, records, communications, and working papers, was used or developed in an investigation made under chapter 48. Thus, this information must not be released to the public, except for a purpose consistent with chapter 48 and as provided by an investigating state agency rule or federal law. *See id.* § 48.101(b); *see also id.* § 48.101(c), (d), (d-1), (e), (e-1), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. Section 48.101(d) of the Human Resources Code provides that "[t]he executive commissioner shall adopt rules providing for the release . . . to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report[.]" Hum. Res. Code § 48.101(d). Section 48.101(e) states "[t]he executive commissioner may adopt rules relating to the release of information . . . that is contained in the record of a deceased individual who was the subject of an investigation conducted by the [Department of Family and Protective Services] or investigating state agency[.]" *Id.* § 48.101(e).

We understand the department has adopted section 1.207 of title 25 of the Texas Administrative Code to govern the release of information pertaining to the abuse, neglect, or exploitation of an elderly or disabled person. Section 1.207 provides:

(h) The completed investigative report regarding abuse, neglect, or exploitation of an elderly or disabled person shall be released to the subject of a report of abuse, neglect, or exploitation or to that person's legal representative upon request. Any information relating to the reporter's identity or any other individual whose safety or welfare may be endangered by the disclosure shall be blacked out or deidentified.

25 T.A.C. § 1.207(h). As previously noted, the requestor is a representative of the father of the deceased individual who is the subject of the report of neglect. As such, the requestor may be the legal representative of the deceased individual and, thus, he may have a right of access to the completed investigation report relating to the deceased individual. *See id.* You state the requestor did not provide documentation indicating he is the legal representative of

the individual at issue for purposes of section 1.207. However, we find if the requestor provides evidence demonstrating he is the legal representative of the individual at issue, then the department must release the submitted investigation report to him as provided in section 1.207. In such case, the remaining information must be withheld under section 48.101 of the Human Resources Code. If the requestor does not provide such evidence, the investigation report and the remaining information you have marked is confidential and must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.³

You claim the remaining information is confidential under section 290dd-2 of title 42 of the United States Code. Section 552.101 also encompasses section 290dd-2, which provides in part the following:

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see* 42 C.F.R. § 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential). Section 290dd-2 makes confidential only records of substance abuse patients that are created and maintained as part of their participation and treatment in a substance abuse program. We understand you to assert that the records at issue were obtained by the department based on the department's regulatory function and are not subject to redisclosure. You inform us that the facility at issue is a federally funded substance abuse treatment program. We note that federal law allows for the release of a patient's substance abuse records upon proper written consent. 42 C.F.R. §§ 2.15, .31, .33; *see* 42 U.S.C. § 290dd-2(b)(1). Accordingly, based on your representations and our review, we conclude that the facility records we have marked may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations.⁴ However, the remaining documents at issue are not records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research from the named facility. Rather, the remaining documents at issue constitute either department records pertaining to the department's inspection of the facility or facility records that do not reflect the identity, diagnosis, prognosis, or treatment of a patient. Accordingly, section 290dd-2 of title 42 of the United States Code does not apply to any portion of the remaining information at issue. Thus, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Next, you argue that some of the remaining information is confidential under section 552.101 in conjunction with the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We conclude the information we have marked constitutes confidential medical records subject to the MPA. Accordingly, the department may only release the marked information in accordance with the MPA.⁵ However, upon review, we conclude none of the remaining information you have marked consists of medical records that are subject to the MPA, and none of it may be withheld on that basis.

Next, you seek to withhold portions of the remaining information under section 611.002 of the Health and Safety Code. Section 552.101 also encompasses section 611.002, which is applicable to mental health records and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Upon review, we find none of the remaining information consists of mental health records. Accordingly, the department may not withhold any of the remaining information pursuant to section 611.002(a) of the Health and Safety Code.

You also claim portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with the doctrines of common-law and constitutional privacy. The doctrine of common-law privacy excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

You claim portions of the remaining information, which you have marked, are subject to either common-law privacy or constitutional privacy. We find some of this information constitutes medical information and information relating to disabilities. However, we note no individuals are identified within the documents at issue. Furthermore, we find the remaining date information you have marked is not highly intimate or embarrassing. Accordingly, none of the remaining information you have marked may be withheld under section 552.101 of the Government Code on the basis of common-law privacy. Further, you have not demonstrated how any of the information at issue falls within the zones of privacy

or implicates an individual's privacy interests for purposes of constitutional privacy. Thus, none of the information you have marked may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

You have marked e-mail addresses in the remaining information. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to the general e-mail address of a business. The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.⁶ However, the remaining e-mail address you have marked is the general e-mail address of a business, and may not be withheld under section 552.137 of the Government Code.

In summary, if the requestor provides evidence demonstrating he is the legal representative of the individual named in the request, then the department must release the submitted investigation report to him as provided in section 1.207 of title 25 of the Texas Administrative Code, but must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. If the requestor does not provide such evidence, the department must withhold the information you have marked in its entirety under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department may only release the facility records we have marked as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations. The department may only release the medical records we have marked in accordance with the MPA. The department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release. The remaining information must be released.

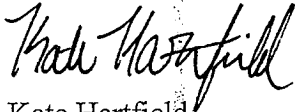
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php.

⁶We note that pursuant to Open Records Decision No. 684, personal e-mail addresses under section 552.137 of the Government Code are one of the ten categories of information governmental bodies may withhold without the necessity of requesting an attorney general decision.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate Hartfield". The signature is fluid and cursive, with the first name "Kate" and last name "Hartfield" clearly distinguishable.

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 412159

Enc. Submitted documents

c: Requestor
(w/o enclosures)